COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP552 **Cir. Ct. No. 2012CV704**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

NATHAN J. LEINWEBER AND JOHN DOE,

PLAINTIFFS-CO-APPELLANTS,

UNITED HEALTHCARE OF WISCONSIN, INC.,

INVOLUNTARY-PLAINTIFF,

V.

ANDREW J. WIRTH,

DEFENDANT-APPELLANT,

ROCK BOTTOM, INC. D/B/A VINNIE'S ROCK BOTTOM BAR & GRILL AND WILSON MUTUAL INSURANCE COMPANY,

DEFENDANTS,

STATE FARM FIRE AND CASUALTY COMPANY,

INTERVENOR-DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. Nathan Leinweber and John Doe (collectively referred to as Leinweber) and Andrew Wirth appeal from an order granting State Farm Fire and Casualty Company's motion for declaratory judgment. The order dismissed State Farm from the underlying tort action and relieved State Farm of the duty to defend and indemnify Wirth.

¶2 Leinweber and Wirth raise multiple arguments on appeal. Wirth argues that declaratory judgment was not procedurally appropriate after State Farm intervened in the underlying tort action. Leinweber argues that the circuit court erroneously exercised its discretion in deciding that issue preclusion does not apply to this case. Both Leinweber and Wirth argue that if issue preclusion does not apply, as the circuit court held, then there are issues of material fact that preclude declaratory judgment.

¶3 We conclude that declaratory judgment was procedurally proper, and that the circuit court did not err in deciding that issue preclusion does not apply or in granting declaratory judgment in favor of State Farm. Therefore, we affirm the order.

BACKGROUND

¶4 Wirth was convicted after a jury trial of two counts of homicide by negligent handling of a dangerous weapon, relating to the deaths of Jennifer Luick and Gregory Peters during an altercation with Wirth at a bar. The relevant

undisputed underlying facts are set forth in the unpublished decision of Wirth's appeal from his conviction:

> ¶4 Wirth and his friend drove to Vinnie's Rock Bottom Saloon in Jefferson. Soon after arriving, [Jennifer] Luick approached Wirth from behind and, according to Wirth, "grabbed his ass" and pushed her finger "towards the crack of [his] butt." Wirth became upset and irritated and told Luick, "[D]on't fucking touch me." Wirth claimed that Luick seemed very upset by his strong reaction to her "grabbing" action. Shortly after, Luick's boyfriend, [Gregory] Peters, approached Wirth, tapped him on the shoulder, and asked him to go outside. Once outside, Peters told Wirth to apologize to Luick, who was standing next to Wirth. Wirth refused to apologize. Peters took a step closer to Wirth, coming within two feet of Wirth's face. Peters lifted his left arm as if to touch Wirth and, according to Wirth, reached behind his back. Wirth testified that Peters' movements led Wirth to believe that Peters was going to pull out a knife and stab him. Wirth grabbed Peters by the throat with his left hand, pulled out his loaded gun with his right hand and pointed the gun at Peters' head. Wirth discharged three rounds from his gun: one round struck Peters' chest, resulting in his death; one round grazed Peters' neck and struck Luick's chest, resulting in her death. Wirth claimed that he could not recall shooting the gun but "figured [Peters] was shot." Wirth did not believe that anyone else had been shot.
>
> ....
>
> ¶7 At trial, the parties did not dispute that Wirth discharged the gun three times or that Peters and Luick died as a result of Wirth's firing the gun.

State v. Wirth, No. 2012AP208-CR, unpublished slip op. at 1-2 (WI App Feb. 21, 2013).

¶5 Leinweber commenced the underlying wrongful death suit against Wirth.[1] State Farm subsequently filed a motion to intervene and to bifurcate and

[1] Nathan Leinweber filed suit as a representative of Luick's estate. John Doe is the son of Jennifer Luick. As indicated, we refer to them collectively as Leinweber.

stay proceedings, and the circuit court granted the motion. At the time of the events that led to Wirth's criminal conviction, State Farm insured Wirth under a Renter's Insurance policy. The policy provided coverage for an "occurrence," which it defined as:

> an accident, including exposure to conditions, which results in:
>
> a. **bodily injury**; or
>
> b. **property damage**;
>
> during the policy period. Repeated or continuous exposure to the same general conditions is considered to be one **occurrence**.

The policy excluded coverage for bodily injury or property damage that was "expected or intended" by the insured. After State Farm intervened, it filed a motion for declaratory judgment, asking the circuit court to declare that State Farm had no continuing duty to defend or to indemnify Wirth in this action because there was no coverage under the policy for Wirth's conduct in this case.

¶6 At the motion hearing, the court reviewed the details surrounding the three shots that Wirth fired. Based on the allegations in the complaint and Wirth's deposition testimony, the parties agreed that the gun that Wirth discharged was a Bersa 0.380 semiautomatic handgun, which required Wirth to overcome a safety mechanism (also characterized by the parties as a "long pull") in order to fire the first shot. Each of the subsequent shots required an actual pulling of the trigger, but with less force than the "long pull" required for the first shot.

¶7 Each of the parties argued that the circuit court was bound by the jury's determinations in the underlying criminal case for different reasons. The circuit court rejected all of the parties' arguments and held that issue preclusion

did not apply because the underlying criminal case had a different burden of proof from the present wrongful death case. The circuit court reasoned that the jury in the criminal case

> reach[ed] its verdict beyond a reasonable doubt, so if [the jury] failed to reach a verdict beyond a reasonable doubt on a criminal conduct that involved both intent and intentional conduct, … it doesn't mean by a preponderance of the evidence that wouldn't happen [in the present case].

The circuit court proceeded to decide the motion using "traditional tests and laws that relate[] to definitions within the traditional insurance law."

¶8 Upon review of the above facts, the circuit court held that Wirth's conduct was not accidental and, therefore, that there was no occurrence and no coverage under the State Farm policy. The circuit court further decided that even if there was an occurrence so as to invoke coverage, the exclusion for intentional acts applied to bar coverage. The court granted State Farm's motion for declaratory judgment, relieving State Farm of the duty to defend and indemnify Wirth.

DISCUSSION

¶9 As noted above, Leinweber and Wirth argue that the circuit court erred in granting State Farm's motion for declaratory judgment for several reasons. Wirth argues that declaratory judgment was not procedurally appropriate after State Farm intervened in the underlying tort action. Leinweber argues that the circuit court erroneously exercised its discretion in deciding that issue preclusion does not apply to this case. Both Leinweber and Wirth argue that if issue preclusion does not apply, as the circuit court held, then there are issues of

material fact that preclude declaratory judgment. In the three sections that follow, we address and reject each of these arguments in turn.

A. Declaratory Judgment After Intervention by Insurer

¶10 Wirth argues that the circuit court erred in granting State Farm's motion for declaratory judgment because declaratory judgment was an inappropriate procedural approach after State Farm intervened in the underlying tort action. We review de novo the question of whether declaratory judgment was procedurally proper. *See* ***Fire Ins. Exchange v. Basten***, 202 Wis. 2d 74, 81-82, 549 N.W.2d 690 (1996) (whether an insurer followed the proper procedural approach in seeking a determination of coverage is a question of law reviewed de novo).

¶11 Wirth argues that declaratory judgment was not procedurally proper on two grounds. First, Wirth cites ***Basten*** for the proposition that once an insurer is joined in the underlying action, the insurer is barred from seeking declaratory judgment. However, nothing in ***Basten*** supports such a proposition. The court in ***Basten*** recognized two alternate means of determining insurance coverage in cases in which coverage is disputed: (1) the "preferred procedure" of "joinder or intervention of all concerned parties followed by bifurcation of the coverage and liability issues, under Wis. Stat. § 803.04(2)(b);" and (2) where the insurer is not named in the underlying lawsuit, the filing by the insurer of a separate declaratory judgment action. ***Basten***, 202 Wis. 2d at 89-90. The court stated that, if the latter alternative is pursued, then the declaratory judgment action and the underlying lawsuit should generally be consolidated. ***Id.*** at 95-6. Thus, a declaratory judgment as to coverage generally comes before the circuit court in the underlying

lawsuit, with the insurer as a party, regardless of whether the declaratory judgment motion is filed in the underlying lawsuit or in a separate action.

¶12 As State Farm notes, intervention by an insurer followed by a motion for declaratory judgment is routine practice in insurance coverage litigation. *See, e.g.*, ***Phillips v. Parmelee***, 2013 WI 105, 351 Wis. 2d 758, 840 N.W.2d 713; ***Air Eng'g, Inc. v. Industrial Air Power, LLC***, 2013 WI App 18, 346 Wis. 2d 9, 828 N.W.2d 565. Here, State Farm intervened as a named party, filed its intervenor complaint for declaratory judgment as to insurance coverage, and then filed its motion for declaratory judgment. We reject Wirth's argument that such a procedure is improper, because his argument is unsupported by ***Basten*** or any other legal authority that he provides.

¶13 Second, Wirth argues that once State Farm was permitted to intervene, it could only seek summary judgment, not declaratory judgment. However, Wirth points to no language in any case or statute that bars an intervenor insurer from seeking declaratory judgment as to insurance coverage in an action for damages against its insured. To the contrary, "both declaratory judgments and summary judgments are proper procedural devices for resolving insurance disputes." ***Young v. West Bend Mut. Ins. Co.***, 2008 WI App 147, ¶6, 314 Wis. 2d 246, 758 N.W.2d 196. We reject Wirth's second ground for arguing that a declaratory judgment is procedurally improper, because, once again, he provides no supporting legal authority.

¶14 We note that a court's granting a motion for declaratory judgment and finding no coverage is akin to "an award of summary judgment in favor of" the insurer. ***Id.***, ¶6. Accordingly, such a declaratory judgment is appropriate only if there are no disputes of material fact. ***Id.*** We address below Wirth's argument

that declaratory judgment was improper because material facts were in dispute. But to sum up so far, we conclude that State Farm's declaratory judgment motion was properly before the circuit court.

B. Applicability of Issue Preclusion

¶15 As we explain in the section that follows, for purposes of insurance coverage, and in particular whether there was a covered "occurrence" within the meaning of the State Farm policy, it might matter whether Wirth caused injury and death by an intentional act, or rather by a merely negligent act. In Leinweber's view, if Wirth caused injury and death by a merely negligent act, then there was a covered "occurrence." Consequently, Leinweber attempted to persuade the circuit court that, under issue preclusion, the jury's finding that Wirth acted with criminal negligence in the prior criminal prosecution should be binding here. In other words, there should be no relitigation of whether Wirth acted negligently or, instead, acted intentionally. Leinweber argues that the circuit court erred in concluding that issue preclusion does not apply because the circuit court did not "conduct[] or even mention[] the two-step analysis required by ***Paige K.B.***"[2] Leinweber contends that had the circuit court conducted the required two-step analysis, it "would have determined that the jury's finding of negligence had preclusive effect and therefore coverage exists [under the State Farm insurance policy]."

¶16 "The doctrine of issue preclusion, formerly known as collateral estoppel, is designed to limit the relitigation of issues that have been actually

[2] ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 224-25, 594 N.W.2d 370 (1999)

litigated in a previous action." ***Aldrich v. LIRC***, 2012 WI 53, ¶88, 341 Wis. 2d 36, 814 N.W.2d 433. The availability of issue preclusion "'is a mixed question of law and fact in which legal issues predominate.'" ***Id.***, ¶91 (quoted source omitted).

¶17 "The first step in the analysis of issue preclusion is to 'determine whether the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment.'" ***Id.***, ¶97 (quoted source omitted). Whether issue preclusion is a potential limit on litigation in a particular case is a question of law that we review de novo. ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶15, 281 Wis. 2d 448, 699 N.W.2d 54.

¶18 Once the initial requirement for the application of issue preclusion is met, the second step in the analysis calls on the court to determine whether the application of the doctrine under the particular circumstances of the case is consistent with fundamental fairness. ***Aldrich***, 341 Wis. 2d 36, ¶98. "[T]he fairness analysis underpinning the application of issue preclusion is committed to the [circuit] court's discretion." ***Ambrose v. Continental Ins. Co.***, 208 Wis. 2d 346, 355, 560 N.W.2d 309 (Ct. App. 1997); *see also* ***Paige K.B.***, 226 Wis. 2d at 225 (whether applying issue preclusion comports with principles of fundamental fairness "is generally a determination within the circuit court's discretion"). The party asserting issue preclusion, here Leinweber, has the burden of showing that the doctrine applies. ***Id.*** at 219.

¶19 Leinweber faults the circuit court for not expressly mentioning or applying a different two-step analysis set forth in ***Paige K.B.***, 226 Wis. 2d at 224-25. However, the two-step analysis set forth in ***Paige K.B.*** only applies when

issue preclusion is sought against a litigant who was not a party to a prior proceeding, which is not the case here. ***Id.*** In ***Paige K.B.***, the victims sued the criminal defendant's parents for damages after the defendant had been found criminally liable, and the victims sought to apply issue preclusion against the defendant's parents. ***Id.*** at 215, 217. Here, in contrast, Leinweber has sued Wirth, a person who *was* a party in the prior criminal proceeding. Leinweber does not develop any argument why the different two-step analysis set forth in ***Paige K.B.*** should apply in the situation presented here, and we therefore do not address his argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider undeveloped arguments).

¶20 However, Leinweber does appear to argue that the circuit court erroneously exercised its discretion by failing to address the second step of the general issue preclusion analysis, which, as noted above, is whether applying issue preclusion comports with principles of fundamental fairness.[3]

¶21 The record discloses that the circuit court did address fundamental fairness when it declined to apply issue preclusion because of the difference in burdens of proof in the underlying criminal case and the present wrongful death case.

¶22 In rejecting the application of issue preclusion, the circuit court reasoned:

[3] Neither Leinweber nor Wirth addresses the first step of the general issue preclusion analysis, whether the issue was actually litigated and determined in the prior proceeding. We need not determine whether the first step is met because, as explained below, we conclude that the circuit court properly exercised its discretion in declining to apply issue preclusion under the second fundamental fairness step. *See* ***State v. Manuel***, 2005 WI 75, ¶25 n.4, 281 Wis. 2d 554, 697 N.W.2d 811 (only dispositive issues need be addressed).

> The jury [in the criminal case] was reaching its verdict beyond a reasonable doubt, so if [the jurors] failed to reach a verdict beyond a reasonable doubt on a criminal conduct that involved both intent and intentional conduct, if they don't reach that verdict, it doesn't mean by a preponderance of the evidence that wouldn't happen [in the present wrongful death case]....
>
> And if a jury beyond a reasonable doubt felt that there was a negligence aspect to what someone was doing, that may not and does not fit within the definition of the tests that we're to apply ....

In other words, because the burden of proof for proving Wirth's criminal conduct was greater in the criminal case, the circuit court concluded there is a possibility that a new jury applying a lower burden of proof could find Wirth's conduct was intentional, rather than merely negligent. In the criminal case, the jury's finding was limited to the finding that Wirth was *at least* criminally negligent. That finding does not preclude a jury in this civil case from finding Wirth to be more than criminally negligent by a preponderance of the evidence.

¶23 The circuit court's reasoning demonstrates that it considered the difference in burdens of proof and decided that applying issue preclusion against State Farm would be fundamentally unfair based on that difference.[4] While the

[4] The United States Supreme Court, similarly considering issue preclusion in a civil proceeding following a criminal proceeding, stated:

> [T]he difference in the burden of proof in criminal and civil cases precludes the application of the doctrine of collateral estoppel. The acquittal of the criminal charges may have only represented "an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." As to the issues raised, it does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil proceedings.

(continued)

circuit court did not use the express language "of the tests that [the court is] to apply," it is clear from our review of the motion hearing transcript that the circuit court rested its decision against applying issue preclusion on its determination, under the second step of the general issue preclusion test, that to do so would be fundamentally unfair in light of the difference in burdens of proof. *See* ***State ex rel. West v. Bartow***, 2002 WI App 42, ¶10, 250 Wis. 2d 740, 642 N.W.2d 233 (finding circuit court considered standard set forth in statute through its reasoning, even though circuit court never specifically referred to the statute).

¶24 Leinweber argues that it would not be fundamentally unfair to apply issue preclusion "because State Farm had the opportunity to, but chose not to, protect against liability for any criminal conduct of its insured" by expressly excluding criminal, rather than intentional conduct from coverage. Leinweber's different view of fundamental fairness does not persuade us that the circuit court erred. Rather, the circuit court applied the correct law, considered the relevant facts of the record, and applied a reasoning process to reach a reasonable result. Therefore, we conclude that the circuit court did not erroneously exercise its discretion, and we uphold the circuit court's decision to deny issue preclusion.

C. Whether Wirth's Conduct Was an "Accident" Triggering Coverage

¶25 Leinweber and Wirth both argue that the circuit court erred in granting declaratory judgment in favor of State Farm because there are disputes of

---

One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972) (citations omitted). The circuit court's reasoning in the present case is similar to that of the United States Supreme Court in ***One Lot Emerald Cut Stones***. Here, Wirth was found not guilty of an intentional crime, but guilty of criminal negligence, under the beyond-a-reasonable-doubt burden of proof. But that is all that the jury found. Wirth's conduct was not adjudicated under the preponderance-of-the-evidence burden of proof that applies in the present civil case.

material fact "as to what happened between Wirth and Peters" after Wirth put the gun to Peters' head.[5] The circuit court found, as a matter of fact, that the causal event was "producing a loaded firearm in conjunction with a dispute with another individual and placing one's finger on the trigger of the firearm and discharging it in close proximity to other human being[s]." The circuit court held, as a matter of law, that such causal event was "not accidental" under the policy. The court concluded that, because the cause was not accidental, there was no occurrence and, therefore, no coverage under the State Farm policy. For the reasons that follow, we agree with the circuit court.[6]

¶26 "In a declaratory judgment action, the granting or denying of relief is a matter within the discretion of the circuit court and is upheld absent an erroneous exercise of discretion." ***J.G. v. Wangard***, 2008 WI 99, ¶18, 313 Wis. 2d 329, 753 N.W.2d 475. "However, when the appropriateness of granting or denying declaratory relief depends on a question of law, our review is de novo." ***Id.*** "Whether an insurance policy affords coverage is a question of insurance contract interpretation, which we review de novo." ***Id.***, ¶19.

[5] Leinweber also argues, in the alternative, that the undisputed facts show that Wirth's conduct was an accident. Leinweber bases this argument on the jury's finding that Wirth was guilty of criminal negligence in the prior criminal action. However, we have already rejected the notion that the jury's finding in the prior criminal action is binding in this civil action, and therefore we do not address this particular argument further.

[6] The circuit court also held that Wirth committed an intentional act, which was excluded under the policy. We need not examine whether the circuit court was correct in deciding that Wirth's conduct fell under the intentional act exclusion, because our conclusion that there was no initial grant of coverage disposes of the appeal. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (declining to consider alternative arguments where resolution of one issue disposes of the appeal).

¶27 "Insurance policies are construed as they would be understood by a reasonable person in the position of the insured. However, we do not interpret insurance policies to provide coverage for risks that the insurer did not contemplate or underwrite and for which it has not received a premium." ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65 (citations omitted). The analysis of coverage begins with examining the facts of the insured's claim and determining whether the policy makes an initial grant of coverage. ***Id.***, ¶24. "If it is clear that the policy was not intended to cover the claim asserted, the analysis ends there." ***Id.***

¶28 To decide the issue of initial grant of coverage in this case, we must decide whether the cause of bodily injury was an "accident" as that term is used in the State Farm policy. The term "accident" is not defined in the policy, and is therefore given its common, everyday meaning. ***Estate of James B. Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶34, 311 Wis. 2d 548, 751 N.W.2d 845. "The dictionary definition of 'accident' is: 'an event or condition occurring by chance or arising from unknown or remote causes.'" ***American Girl***, 268 Wis. 2d 16, ¶37 (quoted source omitted). "'A result, though unexpected, is not an accident; the means or cause must be accidental.'" ***Id.*** (quoted source omitted). Thus, it is the "causal event that must be accidental for the event to be an accidental occurrence." ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 86, ¶40, 311 Wis. 2d 492, 753 N.W.2d 448.

¶29 The decision in ***Sustache***, 311 Wis. 2d 548, is instructive here. Sustache died from injuries incurred during an altercation with Jeffrey Mathews while at an underage drinking party, after Mathews was "harass[ed] and goad[ed] to 'come over to the party to engage in a fight with [Sustache].'" ***Id.***, ¶5. The complaint alleged that Mathews "'committed battery without provocation by

intentionally causing bodily harm to [Sustache] without [his] consent thereby causing [Sustache's] death.'" ***Id.***, ¶50 (alteration in original). There was no dispute that Mathews punched Sustache, causing him to fall to the curb and sustain severe injuries that ultimately led to his death. ***Id.***, ¶5.

¶30 Mathews was insured by an American Family homeowner's policy, which paid for "'bodily injury or property damage caused by an occurrence covered by th[e] policy.'" ***Id.***, ¶8. "Occurrence" was defined under the policy as "'an accident, including exposure to conditions, which results during the policy period, in: a. bodily injury; or b. property damage,'" but the term "accident" was not defined. ***Id.***, ¶9. Examining other case law, our supreme court stated that "[t]he volitional nature of [the insured's] act was key" to the determination of whether an act was accidental. ***Id.***, ¶43. The court ultimately held:

> [W]e cannot conclude that an allegation that [Mathews] "intentionally caus[ed] bodily harm to [Sustache]" could reasonably be "characterized by a 'lack of intention.'" … [Mathews'] alleged decision to intentionally "punch out" Sustache may have produced unexpected results, but this intentional act did not constitute an "accident." One cannot "accidentally" intentionally cause bodily harm.
>
> ... By the complaint's terms, the punch that caused Sustache's injuries and death was not accidental; [Mathews] intended the punch.

Id., ¶52-53 (citation omitted).

¶31 Here, Leinweber alleged in the complaint and the amended complaint that, "Wirth *intentionally fired his weapon* and ultimately shot Luick causing her death." (Emphasis added.) As in ***Sustache***, the complaint's allegations here indicate that the insured intended the act that caused the bodily harm. We reiterate our supreme court's statement in ***Sustache***: "One cannot 'accidentally' intentionally cause bodily harm." ***Id.***, ¶52. In other words, the allegation that Wirth intentionally fired his weapon "evince[s] a degree of *volition*

inconsistent with the term 'accident.'" *See* ***id.***, ¶54 ("[T]he allegations of intentional battery here evince a degree of *volition* inconsistent with the term 'accident.'" (alteration in original; quoted source omitted)).

¶32 Even if we were to assume, as Leinweber and Wirth suggest, that a struggle or "something" occurred between Wirth's act of pointing the gun at Peters' head and the gun firing three times, our conclusion would be the same. The parties do not dispute the underlying facts on which the circuit court relied upon: (1) Wirth pulled the trigger on the semi-automatic handgun that was pointed in the direction of, and in close proximity to, Peters and Luick; (2) Wirth overcame a safety mechanism to discharge the first shot; and (3) Wirth then discharged two additional shots. These are not acts by Wirth which occurred "'by chance or ar[ose] from unknown or remote causes.'" ***American Girl***, 268 Wis. 2d 16, ¶37 (quoted source omitted).

¶33 Again, ***Sustache*** provides guidance. The actor in ***Sustache*** stood in front of his victim and intentionally punched the victim in the face with the unexpected result being the death of the victim. ***Sustache***, 311 Wis. 2d 548, ¶54. Here, Wirth stood close to his victims and intentionally pointed and discharged a gun, with the unexpected result being that one of the bullets passed by Peters and struck and killed Luick. The parties do not persuasively differentiate the facts between the two cases. They point to factual differences in what led up to the fatal act in each case, but they do not demonstrate why the injury-causing act itself in each case is not comparable.

¶34 As we stated above, the "means or cause" must be accidental (meaning non-volitional, unknown, and remote, according to the dictionary and the case law reviewed in ***Sustache***, 311 Wis. 2d 548, ¶¶36-46) in order for there to

be an accidental occurrence. The circuit court found on undisputed facts that the cause of Luick's death was Wirth producing the gun in the midst of a dispute, placing his finger on the gun's trigger, and discharging the gun while in close proximity to other human beings. Under these facts, the cause of Luick's death was volitional, known, and not remote.

¶35 We conclude that Wirth's volitional acts, which the circuit court found caused Luick's death, were not accidental as a matter of law. Accordingly, there was no occurrence so as to trigger coverage under the State Farm policy, and the circuit court properly granted declaratory judgment in favor of State Farm.

CONCLUSION

¶36 For the reasons set forth above, we conclude that the circuit court did not err in deciding that issue preclusion does not apply or in granting declaratory judgment in favor of State Farm. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.